

## **Board of Forestry and Fire Protection**

### **NOTICE OF PROPOSED ACTION**

#### **“Exemption Amendments, 2018”**

**Title 14 of the California Code of Regulations (14 CCR),  
Division 1.5, Chapter 4  
Subchapters 7, Article 2  
Amend: §§ 1038 and 1038.1**

[Notice Published June 01, 2018]

#### **NATURE OF PROCEEDING**

Notice is hereby given that the California State Board of Forestry and Fire Protection (Board) is proposing to take the action described in the Informative Digest.

#### **PUBLIC HEARING**

The Board will hold a public hearing on Thursday, July 19th, 2018, at its scheduled meeting held at the Tri-County Fairgrounds, 1234 Fair Street, Bishop, CA 93514. At the hearing, any person may present statements or arguments, orally or in writing, relevant to the proposed action. The Board requests, but does not require, that persons who make oral comments at the hearing also submit a written summary of their statements. Additionally, pursuant to **Government Code (GOV) § 11125.1(b)**, writings that are public records pursuant to **GOV § 11125.1(a)** and that are distributed to members of the state body prior to or during a meeting, pertaining to any item to be considered during the meeting, shall be made available for public inspection at the meeting if prepared by the state body or a member of the state body, or after the meeting if prepared by some other person.

#### **WRITTEN COMMENT PERIOD**

Any person, or authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. The written comment period ends at 5:00 P.M. on Monday, July 9, 2018.

The Board will consider only written comments received at the Board office by that time and those written comments received at the public hearing, including written comments submitted in connection with oral testimony at the public hearing. The Board requests, but does not require, that persons who submit written comments to the Board reference the title of the rulemaking proposal in their comments to facilitate review.

Written comments shall be submitted to the following address:

Board of Forestry and Fire Protection  
Attn: Eric Hedge  
Regulations Coordinator  
P.O. Box 944246  
Sacramento, CA 94244-2460

Written comments can also be hand delivered to the contact person listed in this notice at the following address:

Board of Forestry and Fire Protection  
Room 1506-14  
1416 9<sup>th</sup> Street  
Sacramento, CA 95814

Written comments may also be sent to the Board via facsimile at the following phone number:

(916) 653-0989

Written comments may also be delivered via e-mail at the following address:

PublicComments@BOF.ca.gov

**AUTHORITY AND REFERENCE (pursuant to GOV § 11346.5(a)(2) and 1 CCR § 14) 14 CCR § 1122** Note: Authority cited: Sections 4551, 4553 and 4584, Public Resources Code. Reference: Sections 4290, 4291, 4516, 4527, 4584 and 4597, Public Resources Code; and EPIC v. California Department of Forestry and Fire Protection and Board of Forestry (1996) 43 Cal. App.4th 1011.

**INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW (pursuant to GOV 11346.5(a)(3)(A)-(D))**

Pursuant to the Z'berg-Nejedly Forest Practice Act of 1973, PRC § 4511, et seq. (FPA) the State Board of Forestry and Fire Protection (Board) is authorized to construct a system of forest practice regulations applicable to timber management on state and private timberlands.

PRC § 4551 requires the Board to "...adopt district forest practice rules... to ensure the continuous growing and harvesting of commercial forest tree species and to protect the soil, air, fish, wildlife, and water resources..." and PRC § 4553 requires the Board to continuously review the rules in consultation with other interests and make appropriate revisions.

PRC § 4584 authorizes the Board to adopt regulation to provide an exemption, from all or portions of the FPA, to a person engaging in certain forest management activities specified by the statute.

### **Wildfire Threat**

Catastrophic wildfire in California is a significant threat to life, public health, infrastructure, private property, and natural resources. This threat has grown in recent years and is likely to continue due to factors such as continued population growth, changing land use patterns, drought, and shifts in climatic conditions.

Data suggests a trend toward increasing acres burned statewide, with particular increases in conifer vegetation types. This trend is supported in part by the fact that the three largest fire years since 1950 have all occurred within the last 10 years, with the costliest and deadliest wildfires in state history both occurring in 2017.

In order to address this ongoing threat, the state developed the 2010 Strategic Fire Plan (most recently updated April 2016) which outlined a vision to create a "... natural environment that is more resilient and man-made assets which are more resistant to the occurrence and effects of wildland fire through local, state, federal and private partnerships." In order to achieve this vision, the Fire Plan states that a major policy component necessary to achieve that vision is fuel hazard reduction that creates resilient landscapes and protects the wildland and natural resource values. In an effort to implement this policy, the legislature and Board have developed several tools to incentivize and assist landowners with landscape level forest management, including funding mechanisms and statutory and regulatory exemptions intended to ease the burdens associated with planning and financing these activities in order to achieve the public benefit of a fire-resilient landscape.

One such tool has been the "La Malfa" Exemption, which was created following the legislative approval of Assembly Bill (AB) 2420 (Chaptered 2004), and later amended through AB 1515 (chaptered 2008). The bills amended PRC § 4584 (j) (as it is currently numbered) with the intent of reducing to risk of catastrophic wildfire in the state by allowing landowners a simplified regulatory pathway for the elimination of "...vertical continuity of vegetative fuels and the horizontal continuity of tree crowns, for the purpose of reducing the rate of fire spread, fire duration and intensity, fuel ignitability, or ignition of tree crowns." The exemption provided a simplified pathway to certain types of harvests but places limits on the diameter of trees which may be harvested while imposing costly fuel reduction standards. Input from the regulated public and monitoring and reporting efforts by the Department of Forestry and Fire Protection (Cal Fire) determined that the exemption was under-utilized by the public and was, therefore, not achieving the widespread fire resiliency that the legislature intended to create.

In an effort to appeal to a wider base of landowners with the goal of treating more acres, the legislature amended, through Assembly Bill 744 (chaptered 2013), PRC § 4584 (j), which then authorized the Board to develop a Pilot Project exemption which included a statutory increase on the diameter limit of harvestable trees and provided the Board

latitude in developing less financially burdensome fuel treatment standards. The Board adopted 14 CCR § 1038 (j) Forest Fire Prevention Pilot Project (FFPPP) in 2014 based off the new statute and existing regulations of 14 CCR § 1038 (i), the Forest Fire Prevention Exemption. As intended by legislature, the Pilot Project was created to assess whether increasing the diameter of trees that may be removed and adjusting the level of fuel treatment required pursuant to the existing Forest Fire Prevention Exemption would reduce the risk of catastrophic fires in specific geographic regions within California.

Over the last eight years, the state has been experiencing widespread and catastrophic tree mortality as a result of drought conditions and bark beetle activity. Between 2010 and 2014, nearly eight million trees died, followed by 3.3 million in 2014, 29 million in 2015, and 62 million in 2016. Since 2016, roughly 2 million trees have died per month in California bringing the total to roughly 129 million dead trees throughout the state since 2010. This large number of dead and dying trees created several significant issues for the public, including the loss of valuable timber resources and serious public health and safety issues in the falling hazard created by structurally weakened trees as well as the increase to the wildland fuel load, which influences wildfire intensity and behavior.

In 2015, the Board adopted “Drought Mortality Amendments, 2015”, first through the emergency rulemaking process, and later certified and made permanent through the regular rulemaking process. The effect this adoption was to provide a person engaging in the cutting or removal of dead or dying trees of any size an exemption, from the plan preparation and submission requirements (PRC § 4581) and from the completion report and stocking report requirements (PRC §§ 4585 and 4587) of the FPA, to capture mortality, address the fuel conditions being made worse by the drought and tree mortality and reduce the falling hazard associated with deteriorating trees. Additionally, when initially adopted, the exemption was given an expiration date of December 31, 2018, which was chosen to correspond to the estimate of how many years it would take for the rate of tree mortality to return to historical levels.

The problem is that within the regulatory exemptions to the FPA there are issues with clarity, consistency, and application.

In December 2017, in response to their annual request for regulatory review, the Board received comments from Cal Fire that certain provisions within the FPRs, specifically portions of 14 CCR § 1038 - Exemptions, could be improved to aid both the Department and the public in regulatory implementation, interpretation and enforcement.

Within 14 CCR § 1038 (j), the Department identified an interpretation issue stemming from provision 14 CCR § 1038 (j)(12), which states “Fuel treatments conducted under 14 CCR § 1038(j)(8), (9), (10) and (11) shall be achieved on at least 80 percent of the treated area.” Cal Fire identified an issue where members of regulated public were interpreting this provision to mean that trees larger than the 26 inches, the diameter limit of 14 CCR § 1038 (j)(8), could be harvested on 20 percent of the treated area. However, because this diameter limit is statutory (within PRC § 4584 (j)(11)(B)) and the

Board does not have authority to create regulations which conflict with statutory requirements, this interpretation is not defensible and has created issues with enforcement and implementation of the regulation. The proposed action seeks to make permanent, through regular rulemaking, amendments to 14 CCR § 1038 (j) which clarify that requirements pertaining to “80% of the treated area” are related only to the treatment of fuels in a manner which is consistent with the statutory goals of the FFPPP.

Currently the Drought Mortality Exemption of 14 CCR § 1038 (k) is set to expire on December 31, 2018, which was chosen by the Board to correspond to the estimate of how many years it would take for the rate of tree mortality to return to historical levels. Since its adoption in 2015, the Drought Mortality Exemption, which allows for the harvesting of dead or dying trees in response to drought related stress, has been used over two thousand times to treat over a quarter of a million acres statewide, and has been used sixty times to treat over two thousand acres in the first three months of 2018. This high level of past and ongoing use indicates that drought related tree mortality is an ongoing issue within the state and demonstrates a need to extend the use of the exemption. The proposed action seeks to amend 14 CCR § 1038 (k), through regular rulemaking, to extend the sunset date of the Drought Mortality Exemption to provide ongoing regulatory relief for landowners affected by statewide drought related tree mortality.

Cal Fire, in their response to the Board, also identified an inconsistency with notification requirements for timber operations pursuant to 14 CCR § 1038. Some of the exemptions provided by the regulation (14 CCR § 1038 (c), (j), (l), and (m)) require timber operators to notify Cal Fire prior to the commencement of timber operations, however others do not require any such notification, which can cause confusion on the part of the exemption submitter and issues with enforcement with Cal Fire. Cal Fire has the authority (under PRC § 4119) and responsibility to inspect timber operations conducted pursuant to the FPA in order to ensure regulatory and statutory compliance. Notification allows Cal Fire to adequately and efficiently schedule inspections of exemption operations. The proposed action seeks to amend, through regular rulemaking, 14 CCR § 1038.1 to require notification to the Department as to when the commencement of operations will occur.

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The purpose of the proposed action is threefold: 1) to clarify that requirements pertaining to “80% of the treated area” are related only to the treatment of fuels in a manner which is consistent with the statutory goals of the Forest Fire Prevention Pilot Project; 2) to extend the sunset date of the Drought Mortality Exemption to provide regulatory relief for landowners affected by statewide drought related tree mortality; and 3) to standardize notification to the Department as to when the commencement of operations will occur.

The effect of this proposed action is to clarify the fuel treatment standards of 1038 (j), extend the sunset date for Drought Mortality Amendments an additional 3 years, and to implement standardized notification procedures.

The primary benefit of the proposed action is the maintenance of a comprehensive regulatory scheme which allows for the clear and consistent application and enforcement of exemption notices and operations. The extension of the Drought Mortality Exemption may benefit public safety throughout the state through addressing the fuel conditions being made worse by the drought and tree mortality and reduce the falling hazard associated with deteriorating trees. The extension may also provide economic benefit to landowners within California who are provided a simplified regulatory mechanism for harvesting dead and dying trees related to drought conditions. Additionally, the standardization of notification processes will improve the efficiency of Cal Fire inspections and enforcement of exemption operations.

There is no comparable federal regulation or statute.

Board staff conducted an evaluation on whether or not the proposed action is inconsistent or incompatible with existing State regulations pursuant to **GOV § 11346.5(a)(3)(D)**. State regulations related to the proposed action were, in fact, relied upon in the development of the proposed action (including 14 CCR § 1038) to ensure the consistency and compatibility of the proposed action with existing State regulations. Otherwise, Board staff evaluated the balance of existing State regulations related to regulatory exemptions from portions of the Forest Practice Act and found no existing State regulations that met the same purpose as the proposed action. Based on this evaluation and effort, the Board has determined that the proposed regulations are neither inconsistent nor incompatible with existing State regulations. The proposed regulation is entirely consistent and compatible with existing Board rules; it simply amends current regulatory language.

Statute to which the proposed action was compared: Public Resources Code Section 4584.

No documents are incorporated by reference.

#### **MANDATED BY FEDERAL LAW OR REGULATIONS**

The proposed action is not mandated by federal law or regulations.

The proposed action neither conflicts with, nor duplicates Federal regulations.

There are no comparable Federal regulations related to the system of forest practice applicable to timber management on state and private timberlands developed pursuant to the FPA. No existing Federal regulations meeting the same purpose as the proposed action were identified.

#### **OTHER STATUTORY REQUIREMENTS (pursuant to GOV § 11346.5(a)(4))**

There are no other matters as are prescribed by statute applicable to the specific State agency or to any specific regulation or class of regulations.

**LOCAL MANDATE (pursuant to GOV § 11346.5(a)(5)).**

The proposed action does not impose a mandate on local agencies or school districts.

**FISCAL IMPACT (pursuant to GOV § 11346.5(a)(6))**

There is no cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code.

A local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by the act, within the meaning of Section 17556 of the Government Code.

Regarding costs or savings to any state agency, the anticipated fiscal impact of the Drought Mortality exemption was expected to be less than \$50,000. The anticipated fiscal impact of the extension of the exemption is expected to be similar. The Drought Mortality exemption also includes an unbudgeted monitoring component. Specifically, the Department must monitor and report on the statewide use of the exemption, including the number of harvest area acres, the areas of application and the degree of compliance. Additionally, the Department must, at a minimum, annually report its findings to the Board. The estimated cost to the Department to complete this monitoring and reporting to gauge the degree of compliance, is \$40,738. This is based on an estimated cost of \$138/ exemption ( $\approx$ 2 hours of a Forester I time per exemption) multiplied by 41% (based off the current rate of inspection for Drought Mortality exemptions) of the 720 exemptions expected to be submitted to Cal Fire during the effective period (1/1/19 to 12/31/21) of the regulation. The Board expects 720 exemptions to be submitted based off current exemption use figures, as 60 exemptions have been submitted within the first 3 months of 2018 which represents 20 exemption submissions per month which can be extrapolated to 720 exemptions for the 36 months of the regulations effective period. Therefore, the maximum total estimated fiscal impact is \$90,738. The Department would not require additional funding for the implementation of the requirements described because the \$90,738 is absorbable within the existing budget. In general, the cost to administer the Forest Practice Program, which includes review and inspection of the 14 CCR 1038(k) exemption, is covered by the Timber Regulation and Restoration Fund.

Other amendments within the proposed action will not have a fiscal impact. These amendments include clarification of existing regulation and one minor reporting requirement. This reporting requirement will provide Cal Fire with additional time to schedule inspections, which may increase efficiency of Department operations, but does not alter the inspection activities or requirements, which remain unchanged.

The proposed action will not result in the imposition of other non-discretionary costs or savings to local agencies.

The proposed action will not result in costs or savings in federal funding to the State.

**HOUSING COSTS (pursuant to GOV § 11346.5(a)(12))**

The proposed action will not significantly affect housing costs.

**SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS, INCLUDING ABILITY TO COMPETE (pursuant to GOV §§ 11346.3(a), 11346.5(a)(7) and 11346.5(a)(8))**

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states (by making it costlier to produce goods or services in California).

**FACTS, EVIDENCE, DOCUMENTS, TESTIMONY, OR OTHER EVIDENCE RELIED UPON TO SUPPORT INITIAL DETERMINATION IN THE NOTICE THAT THE PROPOSED ACTION WILL NOT HAVE A SIGNIFICANT ADVERSE ECONOMIC IMPACT ON BUSINESS (pursuant to GOV § 11346.2(b)(5) and GOV § 11346.5(a)(8))**

The fiscal and economic impact analysis for these Exemption Amendments relies upon contemplation, by the Board, of the economic impact of the provisions of the proposed action through the lens of the decades of experience practicing forestry in California that the Board brings to bear on regulatory development.

The majority of amendments within the proposed action are simple clarifications of existing regulation and one very minor reporting requirement and do not impose new regulatory burdens on the public, however the extension of the Drought Mortality exemption (14 CCR § 1038 (k)) may have economic and fiscal impact. The assessment of these impacts includes:

- Economic analysis done in May 2015 for a previous exemption, the “Drought Mortality Amendments, 2015”, which this proposed action seeks to extend.
- Research done for the Protection of Habitable Structures Exemption, which involved extensive outreach, including a compilation of responses from seven (7) Registered Professional Foresters (RPF(s))/ Licensed Timber Operators (LTO(s)) working throughout the State.
- Information provided by Cal Fire regarding the number of exemptions, the number of acres per exemption, and the number of inspections conducted on Drought Mortality exemptions since its adoption in 2015. The Department received 2073 Drought Mortality exemptions since its adoption, consisting of 250,175 acres. The exemption notices ranged from 1 to 10,026 acres. The Department conducts inspections on approximately 41% of submitted exemptions.
- Additional outreach, done in February 2016, specific to how the 1038(k) exemption benefits landowners.

**STATEMENTS OF THE RESULTS OF THE ECONOMIC IMPACT ASSESSMENT (EIA)**



The results of the economic impact assessment are provided below pursuant to **GOV § 11346.5(a)(10)** and prepared pursuant to **GOV § 11346.3(b)(1)(A)-(D)**. The proposed action:

- (A) will create jobs within California;
- (A) will not eliminate jobs within California;
- (B) will not create new businesses,
- (B) will not eliminate existing businesses within California
- (C) will beneficially affect the expansion or contraction of businesses currently doing business within California.
- (D) will yield nonmonetary benefits. For additional information on the benefits of the proposed regulation, please see anticipated benefits found under the Informative Digest/Policy Statement Overview.

### **COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS (pursuant to GOV § 11346.5(a)(9))**

The Board is aware of cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. This initial determination is based on the same record facts, evidence, documents, testimony, or other evidence as listed as the basis for the Significant Statewide Adverse Economic Impact.

- 720 exemptions are expected to be submitted to CAL FIRE during the effective period (01/01/19 to 12/31/21) of the regulation.
- Preparation costs are estimated to be between \$50 and \$5,000 depending on many factors including the size of the harvest area, RPF involvement, topography, brush, size of trees and number of trees.
- Similarly, implementation costs depend heavily on many factors including harvest area, topography, brush, size of trees, number of trees, delivered log price and infrastructure constraints. The following two scenarios are provided in an attempt to convey the cost of implementation.
  - Scenario 1: The estimated cost per exemption would be \$15,000 if the harvest area was 20 acres and the implementation cost per acre was \$750 (for the harvest and removal of dead and dying trees in compliance with the operational provisions of the Forest Practice Rules).
  - Scenario 2: The estimated cost per exemption would be \$15,000 if there was 50 thousand board feet (MBF) in dead and dying trees to be harvested and removed (in compliance with the operational provisions of the Forest Practice Rules) on 20 acres and the implementation cost per MBF was \$300.
- The minimum estimated cost to move in equipment or a crew is \$500.
- The cost of new notification requirements will likely range from \$0 to \$25 per exemption, which is based on the estimation that the required notification is very minor and will likely require 1 to 10 minutes of labor per exemption to execute.
- Therefore, the combined cost of preparation and implementation ranges from \$550 to \$20,525 per exemption and, while it may be higher in some instances, is

likely to cost roughly \$5,000 per exemption, as the median exemption acreage for drought mortality exemptions is 7 acres.

**BUSINESS REPORT (pursuant to GOV §§ 11346.5(a)(11) and 11346.3(d))**

The proposed action does not impose a business reporting requirement.

**SMALL BUSINESS (defined in GOV 11342.610)**

Small business, within the meaning of GOV § 11342.610, is expected to be effected by the proposed action. The types of small businesses that will be beneficially impacted by the proposed action are industrial and nonindustrial forest landowners, forestry consulting, logging, tree removal, landscapers, lumber mills, biogenic energy producers and shavings plants.

Small business, pursuant to 1 CCR § 4(a):

- (1) Is legally required to comply with the regulation;
- (2) Is not legally required to enforce the regulation;
- (3) Does not derive a benefit from the enforcement of the regulation;
- (4) May incur a detriment from the enforcement of the regulation if they do not comply with the regulation.

Pursuant to 1 CCR § (b), the reason(s) the regulation affects small business are the same as provided in the Economic Impact Analysis in the Initial Statement of Reasons.

**ALTERNATIVES INFORMATION**

In accordance with **GOV § 11346.5(a)(13)**, the Board must determine that no reasonable alternative it considers, or that has otherwise been identified and brought to the attention of the Board, would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

**CONTACT PERSON**

Requests for copies of the proposed text of the regulations, the Initial Statement of Reasons, modified text of the regulations and any questions regarding the substance of the proposed action may be directed to:

Board of Forestry and Fire Protection  
Attn: Eric Hedge  
Regulations Coordinator  
P.O. Box 944246  
Sacramento, CA 94244-2460  
Telephone: (916) 653-8007

The designated backup person in the event Mr. Hedge is not available is Matt Dias, Executive Officer for the Board of Forestry and Fire Protection. Mr. Dias may be contacted at the above address or by phone at (916) 653-8007.

### **AVAILABILITY STATEMENTS (pursuant to GOV § 11346.5(a) (16), (18))**

All of the following are available from the contact person:

1. Express terms of the proposed action using UNDERLINE to indicate an addition to the California Code of Regulations and ~~STRIKETHROUGH~~ to indicate a deletion.
2. Initial Statement of Reasons, which includes a statement of the specific purpose of each adoption, amendment, or repeal, the problem the Board is addressing, and the rationale for the determination by the Board that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it is proposed.
3. The information upon which the proposed action is based (pursuant to **GOV § 11346.5(b)**).
4. Changed or modified text. After holding the hearing and considering all timely and relevant comments received, the Board may adopt the proposed regulations substantially as described in this notice. If the Board makes modifications which are sufficiently related to the originally proposed text, it will make the modified text—with the changes clearly indicated—available to the public for at least 15 days before the Board adopts the regulations as revised. Notice of the comment period on changed regulations, and the full text as modified, will be sent to any person who testified at the hearings, submitted comments during the public comment period, including written and oral comments received at the public hearing, or requested notification of the availability of such changes from the Board of Forestry and Fire Protection. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

### **FINAL STATEMENT OF REASONS**

When the Final Statement of Reasons (FSOR) has been prepared, the FSOR will be available from the contact person on request.

### **INTERNET ACCESS**

All of the material referenced in the Availability Statements is also available on the Board web site at:

[http://bofdata.fire.ca.gov/regulations/proposed\\_rule\\_packages/](http://bofdata.fire.ca.gov/regulations/proposed_rule_packages/)